SHOOK, HARDY & BACON LLP
2555 Grand Boulevard
Kansas City, MO 64108-2613
Telephone: 816.474.6550
Facsimile: 816.421.5547
By: David R. Erickson, Esq. (admitted *pro hac vice*)
Joseph H. Blum (NJ Bar No. 010211984)
Common Counsel for the Small Parties Group

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
NEWARK VICINAGE

OCCIDENTAL CHEMICAL CORPORATION, Plaintiff, v. 21ST CENTURY FOX AMERICA, INC., ET AL.; Defendants.	Hon. Judge Madeline Cox Arleo Hon. Joseph A. Dickson Civil Action No. 2:18-CV-11273 (MCA-JAD) **THE SMALL PARTIES GROUP DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS** Return Date: November 30, 2018 Oral Argument Requested

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INTRODUCTION

Occidental's oppositions to the SPG's motion to dismiss are contrary to settled and controlling CERCLA precedent, relying on statutory constructions supported only by inapposite, non-CERCLA cases. Occidental has not begun to overcome the SPG's showing that the authorities interpreting the CERCLA provisions at issue mandate dismissal of Occidental's claims for three independent reasons.

First, every court to address the issue has held that when a party settles its CERCLA liability with the government in an administrative settlement (either in a consent decree or an Administrative Settlement Agreement and Order on Consent (an "AOC" or "ASAOC")), that party cannot bring a § 107(a) cost-recovery claim to recover costs incurred or to be incurred under that settlement. In particular, the Third Circuit has held that allowing a § 107(a) claim in this situation would result in an "inequitable" and "perverse result." Courts (including this district) have routinely rejected Occidental's manufactured distinction between consent decrees and ASAOCs and hold that ASAOCs fall within the category of administrative settlements that trigger the exclusion of § 107 claims. Occidental's § 107(a) cost-recovery claims must therefore be dismissed.

Second, each of Occidental's claims must be dismissed because Occidental failed to adequately plead that it incurred response costs. Rather, its Complaint offers only an inadequate, formulaic recitation of labels, conclusions, and unsupported assertions.

Third, each of Occidental's claims are partially or completely barred for various other reasons. Its § 113(f) contribution claims under the Tierra Removal ASAOC and the CSO ASAOC are time-barred against all defendants. Its § 113(f) contribution claims under the RM 10.9 Removal UAO are time-barred against some defendants and barred as to other defendants by contribution

protection. Also, Occidental has no current claims under the 2016 ASAOC as to many of the defendants because of the mutual release Occidental executed in the Tierra/Maxus bankruptcy.

In short, every SPG member has one or more unrebutted, meritorious bases for dismissal to each of Occidental's claims, and Occidental's Complaint should thus be dismissed as a matter of law.

ARGUMENT

A. Occidental is precluded from bringing a § 107(a) cost-recovery claim.

Every court to consider the issue agrees that if a party can bring a § 113(f) contribution claim, it cannot bring a § 107(a) cost-recovery claim for the same costs. There is no contrary precedent and Occidental does not argue otherwise. Instead, Occidental asks this Court to disregard the reasoning and holdings of binding Third Circuit precedent, multiple District of New Jersey opinions, and appellate and district courts from the First, Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits.

1. Every court to consider the issue has held that a plaintiff that incurs costs under an administrative settlement or a civil action cannot bring a § 107(a) cost-recovery claim for those costs.

Courts unanimously agree that when a plaintiff enters into an administrative settlement that resolves that party's liability, the party is limited to a § 113(f) contribution claim.[1]

This district recently reached this exact result, holding that a plaintiff who has settled its CERCLA liability pursuant to an AOC (like Occidental) cannot bring a § 107(a) cost-recovery

[1] *See generally* SPG Br. at pp. 15-16 & n.12 (compiling citations).

claim. *See Cranbury Brick Yard, LLC v. United States*, Civil Action No. 15-2789 (BRM) (LHG), 2018 WL 4828410 (D.N.J. Oct. 3, 2018) (J. Martinotti).[2] In an identical factual situation as that presented in this case, the plaintiff in *Cranbury* entered into an AOC requiring it to remediate a site contaminated by its corporate predecessor. *Id.* at *2. Just as in Occidental's ASAOCs, the AOC in *Cranbury* stated that it "constitute[d] an administrative settlement within the meaning of CERCLA Section 113(f)(3)(b)" and that it "intended to resolve the liability of [the plaintiff] for some or all of a response action as related to [specified] investigation, remediation, and Remedial Work." *Id.*[3] Like Occidental, the plaintiff in *Cranbury* argued that it undertook the cleanup "voluntarily" and could thus bring a § 107(a) cost-recovery claim. *Id.* at *4.

Judge Martinotti—consistent with every court that has ruled on this issue—held that whether the plaintiff entered into an AOC "voluntarily" was irrelevant[4] and that, because the

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[2] Occidental relies on its own *ipse dixit* and out-of-context dicta from *United States v. Atlantic Research Corp.*, 551 U.S. 128 (2007) to argue that if a party settles its liability under an ASAOC, it can bring a § 107(a) cost-recovery claim. *Atlantic Research* did not, however, decide whether a party who incurs costs pursuant to an ASAOC can recover those costs under § 113(f) or § 107(a). And every court to confront this issue in the decade since *Atlantic Research* was decided has held that a party in such a situation can bring only a § 113(f) contribution claim with respect to the costs incurred under the ASAOC.

[3] Occidental does not contest that the Tierra Removal ASAOC, the CSO ASAOC, or the 2016 ASAOC are administrative settlements. Nor could it. Each ASAOC specifically states that it "constitutes an administrative settlement" for purposes of § 113(f) and that under each ASAOC, Occidental "resolved [its] liability to the United States." Blum Cert., Ex. 2, Tierra Removal ASAOC at ¶ 82(b); Ex. 4, CSO ASAOC at ¶ 104(b); Ex. 5, 2016 ASAOC at ¶ 105. Moreover, Occidental specifically brought § 113(f) contribution claims for costs allegedly incurred under each of these ASAOCs, implicitly conceding that these orders satisfy one of the triggers necessary to maintain a § 113(f) contribution action. *See* Compl. at ¶¶ 278, 280-281.

[4] "CERCLA does not ask whether a person incurs costs voluntarily or involuntarily." *Bernstein v. Bankert*, 733 F.3d 190, 210 (7th Cir. 2013); *Exxon Mobil Corp. v. United States*, 108 F. Supp. 3d 486, 512 (S.D. Tex. 2015) ("[A]s the government contends and the weight of authority

plaintiff had settled its liability in an AOC, it was limited to a § 113(f) contribution claim. *Id.* at *4; *see also* Supplemental Certification of Joseph H. Blum ("Blum Supp. Cert."), Ex. 1, *Sandvik, Inc. v. Hampshire Partners Fund VI, L.P.*, 13-4667-SDW-MCA (ECF No. 23) (Apr. 4, 2014) (J. Wigenton) at p. 7 (holding that a plaintiff "does not have a § 107(a) claim for response costs incurred pursuant to" a ASAOC).[5] Because Occidental's claims based on the Tierra Removal ASAOC, the CSO ASAOC, and the 2016 ASAOC arise out of administrative settlements, Occidental can only bring a § 113(f) contribution claim for alleged costs under those settlements.

A party that is subject to a civil action is also limited to a § 113(f) contribution claim. *See* 42 U.S.C. § 9613(f). Occidental's argument that the RM 10.9 Removal UAO is not a civil action giving rise to a § 113(f) contribution claim is directly contradicted by this district's holding in *Transtech Indus., Inc. v. A & Z Septic Clean*, 798 F. Supp. 1079, 1086 (D.N.J. 1992).[6] It is also contradicted by Occidental's own pleading, where Occidental alleged § 113(f) contribution claims

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demonstrates, the critical question is the PRP's procedural circumstances, not whether its response costs were voluntary or involuntary.").

[5] *See also, e.g., NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 692 (7th Cir. 2014) (dismissing the plaintiff's § 107(a) cost-recovery claim and limiting the plaintiff that settled its liability under an AOC to a § 113(f) contribution claim); *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 766 (6th Cir. 2014) (same); *Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594, 604-05 (8th Cir. 2011) (same); *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 127-28 (2d Cir. 2010) (same).

[6] Occidental's argument that *Transtech* was overturned by *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004) is incorrect. In *Cooper*, the Supreme Court specifically declined to decide whether a UAO was a civil action, stating "[n]either has Aviall been subject to an administrative order under § 106; thus, we <u>*need not decide*</u> whether such an order would qualify as a 'civil action under section 9606.'" *Id.* at 168 n.5 (emphasis added); *see also PCS Nitrogen, Inc. v. Ross Dev. Corp.*, 104 F. Supp. 3d 729, 742 (D.S.C. 2015) ("This court must now also resolve the issue left open by the Supreme Court in *Cooper Industries*, i.e., whether an administrative order under § 106 qualifies as a civil action under § 106 or § 107 of CERCLA. This Court concludes that it does." (internal citation omitted)).

based on the RM 10.9 Removal UAO.

Because Occidental settled its liability with the government or was subject to a civil action for all of its claims, Occidental's § 107(a) cost-recovery claims fail as a matter of law and must be dismissed.

2. Binding Third Circuit precedent also prohibits a plaintiff who has settled its liability with the government and received § 113(f) contribution protection from bringing a § 107(a) claim for the costs incurred under that settlement.

Third Circuit precedent concurs in this result. In *Agere Systems, Inc. v. Advanced Environmental Technology Corp.*, 602 F.3d 204 (3d Cir. 2010), the Third Circuit held that a party that settles its liability with the government and receives contribution protection can only bring a § 113(f) contribution suit. 602 F.3d at 229. The Third Circuit reasoned that allowing a party with contribution protection to bring a § 107(a) cost-recovery claim would result in an "inequitable" and "perverse result" that would undermine the goals of CERCLA and implicate the concern the Supreme Court decried in *Atlantic Research* of allowing a PRP to "eschew equitable apportionment under § 113(f) in favor of joint and several liability § 107(a)." *Id.* at 228-29; *see also N.J. Dep't of Envt'l Prot. v. Am. Thermoplastics Corp.*, Case No. 98-cv-478 (WHW) (CLW), 2018 WL 3536090 (D.N.J. July 23, 2018) (J. Walls) ("The Third Circuit . . . in *Agere Systems*, [held] that third-party plaintiffs who have reached a settlement agreement under which they are obligated to perform clean-up work are limited to Section 113(f) claims and do not have any § 107(a) claims.").

This litigation exemplifies the potential "inequitable" and "perverse result" the Third Circuit feared. Occidental claims it brought this litigation "to ensure that each and every

responsible party pays its fair share of the costs to remedy the pollution of the Passaic River."[7] However, EPA already determined that dioxin (the chemical Occidental[8] intentionally discharged into the Passaic River) is the primary contributor to human health and ecological risk at the Site.[9] Occidental is the predominant dioxin discharger at this Site and consequently the most liable party. Allowing Occidental to maintain a § 107(a) cost-recovery claim would result in the exact opposite of ensuring that all parties pay their fair share. If Occidental can bring a § 107(a) claim, it could then impose joint and several liability against any defendant and be protected from any

[7] *See* "Plaintiff Occidental Chemical Corporation's Opposition to the SPG Group's Motion to Dismiss for Failure to (1) Allege OxyChem Incurred Costs; and (2) State a Cost Recovery Claim Under Section 107" at p. 1.

[8] Occidental continues to repeat its factually and legally inaccurate and misleading assertion that Occidental did not pollute the Passaic River. Occidental does not dispute that Diamond Shamrock Chemicals Company intentionally polluted the Passaic River with dioxin. Nor does Occidental dispute that Diamond subsequently merged into Occidental—i.e., legally Occidental *is* Diamond. *See, e.g.*, Compl. ¶ 10; *see also* Blum Cert., Ex. 2, Tierra Removal ASAOC at ¶ 10(f); SPG Brief, at p. 3 n.3. Thus, Occidental is legally and equitably responsible for Diamond's discharges and, in accordance with CERCLA case law, cannot shirk Diamond's liabilities for polluting the Passaic River. *See, e.g., Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 92 (3d Cir. 1988) (extending CERCLA liability to successor corporation). That Occidental would feel the need to make such an extreme legal argument in an attempt to distance itself from the actions and environmental releases of its corporate predecessor-by-merger, Diamond, speaks volumes about the nature of those actions and environmental releases.

[9] EPA determined dioxin to be the predominant contributor for both human health cancer risk (70% of the risk from fish consumption and 82% of the risk for crab consumption) and non-cancer risk (56% of the risk from fish consumption and 75% of the risk from crab consumption). EPA also found the ecological risk to be driven predominantly by 2,3,7,8-TCDD—the type of dioxin Occidental discharged. EPA, *Record of Decision for the Lower Eight Miles of the Lower Passaic River* (Mar. 3, 2016), at 41, available online at http://passaic.sharepointspace.com/Public%20Documents/Passaic%20Lower%208.3%20Mile%20ROD%20Main%20Text%20396055.pdf. at 29-30.

contribution suits because of its contribution protection.[10] The end result: Occidental could pay *nothing* even though it is far and away the most liable party at the Site.[11]

The Third Circuit's reasoning in *Agere* applies equally to any party with contribution protection—regardless of whether they received contribution protection through a consent decree or an AOC. Thus, because Occidental has contribution protection, its § 107(a) claims must also be dismissed under the reasoning and holding of *Agere*.

B. Occidental failed to sufficiently plead that it incurred costs.

1. A CERCLA plaintiff must plead it incurred response costs with specificity.

Occidental's Complaint should also be dismissed because Occidental failed to allege adequately that it incurred response costs. In its Complaint, Occidental makes no specific, non-conclusory allegations of any response costs it incurred or response actions it undertook. This is especially important where, as here, Occidental agrees that much of the "costs" it has alleged were

[10] *See Agere*, 602 F.3d at 228 ("[I]f we allowed [the plaintiffs] to bring a § 107(a) here and assert joint and several liability against [the defendant], [the defendant] would be barred from then bringing a contribution counterclaim . . . As a result, those plaintiffs would be able to recover 100 percent of their own costs against [the defendant], even though they themselves are actually responsible for . . . a significant portion of the contamination at the [] Site.").

[11] It should also be noted that many SPG members have been actively working with EPA for over a decade to conduct key remedial investigation and feasibility studies on the River and cooperatively entered into orders with EPA to address River Mile 10.9 and other areas of the River. Although Occidental misleadingly portrays itself as the only PRP that has done anything to investigate or remediate historic contamination, Occidental and its indemnitors abandoned these efforts, refused to cooperate with SPG members' environmental response efforts, and ultimately forced EPA to issue Occidental a unilateral order to compel its participation. By comparison, EPA has never had to issue a unilateral order to any SPG member. In addition, other SPG members were never identified by EPA and only became involved when Occidental filed suit.

in fact expended by others.[12]

The Supreme Court-established pleading standards set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) are well-known, oft-cited, and demonstrate precisely the deficiencies in Occidental's pleading and why its Complaint should be dismissed. "The pleading standard [in] Rule 8 . . . demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 55 U.S. at 567). "[A] pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557.).

Occidental opposes dismissal by citing to documents outside its Complaint[13]—documents which obviously do not satisfy Occidental's pleading obligations. Tellingly, Occidental points the Court to only two paragraphs out of the 287 paragraphs in its 190 page Complaint that it claims support that Occidental incurred response costs—paragraphs 36 and 43:

> 36. . . . OxyChem has been forced to incur millions of dollars of response costs to address DSCC's operations at the Site.

[12] Occidental made specific allegations of costs incurred by Tierra and Maxus, but concedes that it cannot recover costs incurred by third-parties, including Tierra and Maxus.

[13] Occidental cites to: (1) EPA's Record of Decision—but fails to explain how an EPA-authored document shows what Occidental has done or paid; (2) Occidental's allegations against Defendants—allegations irrelevant to establishing whether Occidental has sufficiently pleaded that it incurred response costs; and (3) the ASAOCs and UAO at issue, claiming these "are real," "require OxyChem to take concrete action," and that "OxyChem faces manifest consequences for noncompliance." For obvious reasons, these documents do not fix the Complaint's deficient pleadings—being ordered to do something (or facing consequences for not doing something) is not the same as actually doing work or incurring costs. Further, none of these documents refer to, much less identify with the requisite specificity, any costs Occidental has purportedly incurred.

> 43. OxyChem has incurred and will incur costs in the performance of the work required by the 2016 ASAOC, including but not limited to, costs of investigation, testing, and design of the remedy mandated by the OU2 ROD. . . . OxyChem also seeks recovery of Defendants' respective fair and equitable shares of the costs OxyChem has incurred and/or will continue to incur pursuant to the Tierra Removal ASAOC, the CSO ASAOC, and the RM 10.9 Removal UAO and costs associated with investigating and identifying other PRPs responsible for polluting the Lower Passaic River, whether as a result of direct discharge, downstream flows, migration from upland sites, improper disposal, or tidal influences from Newark Bay.

Courts have routinely dismissed similarly conclusory, thread-bare allegations.[14] For example:[15]

Insufficient Allegations	**Court's Reasoning for Dismissal**
***Ford Motor Co. v. Michigan Consolidated Gas Co.*, No. 08-CV-13503-DT, 2010 WL 3419502 (E.D. Mich. Aug. 27, 2010).** "MichCon has incurred response costs associated with the SRA Property including, but not limited to, costs to investigate and evaluate the source of releases of hazardous substances at and from the SRA	"MichCon's allegations that it incurred costs of recovery, without more, constitute [] unadorned, conclusory allegations of legal violations." *Id.* at *6. "Essentially, MichCon has only recited the elements of a cost recovery claim, but a pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Id.* (internal quotations, footnotes, and alterations omitted). "It is simply not enough to allege that MichCon incurred costs of response, without detailing *any* factual

[14] Occidental's argument that its unsupported allegations must be accepted as true does not apply to legal conclusions. *Iqbal*, 556 U.S. at 678 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice."); *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1153-54 (9th Cir. 1989) (holding that the incurrence of costs is an element of a CERCLA claim, not a component of damages).

[15] Occidental's claim that it incurred necessary response costs in identifying other PRPs is similarly unsupported and implausible. Occidental concedes it did not incur any response costs until 2016. By then, EPA had been studying the River for over three decades, Occidental had been subject to multiple administrative orders for over a decade and a half, and Tierra/Maxus had allegedly incurred tens of millions of dollars satisfying Occidental's obligations. The only plausible explanation why Occidental would incur PRP search costs in 2016 was "solely in preparation for litigation" and such costs are not recoverable. *See Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 91-92 (2d Cir. 2000); *see also* SPG Br. at pp. 26-27.

Property." 2010 WL 3419502, at *5.	allegations in support of the statement . . . or without otherwise enhancing the bare recitation of the element of a cost recovery claim." *Id.* at *7 (emphasis in original).
***McGregor v. Industrial Excess Landfill, Inc.*, 856 F.2d 39 (6th Cir. 1988).** "The United States, the State of Ohio and plaintiffs have incurred and will continue to incur costs in connection with activities under CERCLA, including costs of investigation, clean up, removal and remedial action at the facility." 856 F.2d at 42.	"[P]laintiffs failed completely to allege in their complaints either the costs they incurred, or, at minimum, the actions they took in response to the allegedly hazardous conditions at the [Site]." *Id.* at 42. "In the instant case, the plaintiffs pled with specificity the response costs and response actions undertaken by the federal government and the State of Ohio but failed to allege any similar factual basis for their conclusory allegation that they had personally incurred response costs consistent with the National Contingency Plan. The district court was not, therefore, required to presume facts that would turn plaintiffs' apparently frivolous claim under Section 107 of CERCLA into a substantial one." *Id.* at 43.
***Cook v. Rockwell International Corp.*, 755 F. Supp. 1468 (D. Colo. 1991).** "As a proximate result of the releases and threatened releases of hazardous substances into the environment surrounding Rocky Flats, [the plaintiffs] have incurred and will continue to incur necessary response costs consistent with the National Contingency Plan." 755 F. Supp. at 1475.	"Conclusory allegations which merely mirror the terms of the statute are insufficient. The complaint must specify at least one cognizable response cost incurred by each named plaintiff prior to filing the lawsuit." *Id.* at 1475. "If plaintiffs have incurred no cognizable response costs, it is appropriate to dispose of the CERCLA claim at the outset. On the other hand, if plaintiffs have incurred cognizable response costs, it presents no undue burden to identify them in the complaint." *Id.* "[T]o withstand a 12(b)(6) motion to dismiss, plaintiffs must identify in their complaint at least [one] prefiling response cost cognizable under CERCLA." *Id.*
***General Cable Industries, Inc. v. Zurn Pex, Inc.*, 561 F. Supp. 2d 653 (E.D. Tex. 2006).** Plaintiff alleged "it incurred costs to investigate and monitor the contamination of its Property" and "expended response costs consistent with the National Contingency Plan . . . within the meaning of CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4), including costs to monitor, assess, and evaluate the release or threat of	"The Plaintiff in this action pled with specificity the response actions taken by the Defendants to contain the release of TCE. The Plaintiff, however, failed to allege any similar factual basis for its conclusory allegation that it expended response costs consistent with the National Contingency Plan." *Id.* at 658.

release of hazardous substances into the environment." 561 F. Supp. 2d at 658.	

Occidental's allegations that it incurred response costs are indistinguishable from those held insufficient by previous courts. Because Occidental offers only a formulaic, factually unsupported recitation that Occidental incurred costs, its Complaint must be dismissed.

Occidental's "Proposed Supplemental Complaint" is equally infirm, confirming that Occidental cannot adequately plead the required factual predicate of its claims. Allowing Occidental leave to amend would thus be futile.[16] In the only "new" paragraph of Occidental's "Proposed Supplemental Complaint" addressing the response costs Occidental alleges it incurred, Occidental continues to reiterate the same conclusory, thread-bare allegations:

> 272. OxyChem has incurred and will continue to incur response costs pursuant to the Tierra Removal Order, the CSO ASAOC, the RM 10.9 Removal UAO, and the 2016 ASAOC and for investigating and identifying other PRPs. These costs have been and will continue to be incurred by OxyChem for (i) actions taken in response to the release or threatened release of hazardous substances at the Site, within the meaning of 42 U.S.C. § 9607(a)(4); (ii) for necessary costs of response consistent with the National Contingency Plan, within the meaning of 42 U.S.C. § 9607(a)(4)(B); and (iii) in excess of OxyChem's equitable shares, within the meaning of 42 U.S.C. § 9613(f). OxyChem only seeks recovery of its own costs, and not those of its indemnitors prior to their bankruptcy.

Occidental forecasts what it would do if it had an opportunity to amend, yet only repeats and rearranges its inadequate allegations. This further demonstrates that Occidental is not able to

[16] Occidental's informal request to amend its Complaint is unsupported by any motion and should be rejected on that basis alone. Because Occidental conditions its request to amend on the outcome of the motions to dismiss, the SPG is not at this time fully addressing all of the deficiencies in Occidental's amended pleading, but reserves the right to do so.

meet its pleading burden.

2. Because Occidental failed to adequately allege it incurred any past costs, its claim for declaratory relief for future costs also fails.

Occidental agrees that a plaintiff cannot bring a claim for declaratory relief for future costs before it has incurred some past costs.[17] Because Occidental failed to properly allege that it has incurred any past costs, its claims for future, declaratory relief also fail as a matter of law.

C. Independent defenses separately warrant dismissal of Occidental's claims.

1. As to most defendants, Occidental's § 113(f) contribution claims for the Tierra Removal ASAOC, the CSO ASAOC, and the RM 10.9 Removal UAO are barred by CERCLA's three-year statute of limitations.

Courts agree that § 113(g) is the statute of limitations for all § 113(f) contribution actions (no matter how that contribution action arises)—in particular, any claims brought more than three years after an AOC was executed are time-barred.[18] *See Hobart*, 758 F.3d at 772–75; *BASF Catalysts LLC v. United States*, 479 F. Supp. 2d 214, 224 (D. Mass. 2007); *The Peoples Gas Light & Coke Co. v. Beazer E., Inc.*, No. 14 C 2434, 2014 WL 4414537, at *4–5 (N.D. Ill. Sept. 8, 2014).[19]

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[17] *See* "Plaintiff Occidental Chemical Corporation's Opposition to the SPG Group's Motion to Dismiss for Failure to (1) Allege OxyChem Incurred Costs; and (2) State a Cost Recovery Claim Under Section 107" at p. 11 (noting that a plaintiff can only receive declaratory relief for future costs after incurring some past response costs) (quoting *BP Amoco Chem. Co. v. Sun Oil Co.*, 200 F. Supp. 2d 429, 437 (D. Del. 2002) ("[S]ections 107 and 113 envision that before suing, CERCLA plaintiffs will spend some money responding to an environmental hazard.")).

[18] No court has yet decided when the three-year statute of limitations is triggered by a UAO, but it would presumably commence when the UAO is issued, analogous to the execution of an AOC. *Cf. Hobart*, 758 F.3d at 772-75.

[19] Occidental requests this Court ignore CERCLA's statute of limitations and instead borrow a statute of limitations from state law. This argument, however, has been squarely rejected by

In a decision issued after this motion was filed, this district concurred, holding that the three-year limitations period for § 113(f) contribution actions applies even if the claim involves a type of settlement that is not explicitly mentioned in § 113(g)(3).[20] *Cranbury*, 2018 WL 4828410, at *6; *see also* Blum Supp. Cert., Ex. 1, *Sandvik* Order at p. 11 (holding that an ASAOC is an administrative settlement subject to the three-year statute of limitations period for the contribution actions in § 113(g)(3)(B)). Accordingly, a three-year statute of limitations applies to all of Occidental's § 113(f) contribution claims.

a. Occidental's defenses to the statute of limitations are inapplicable.

Occidental incorrectly claims that standstill agreements and equitable defenses preclude dismissal on statute of limitations grounds. But the 2007 Standstill Agreement does not encompass Occidental's claims and the 2015 Standstill and Tolling Agreement was not entered into until after the Tierra ASAOC and CSO ASAOC were already time-barred.[21] And Occidental's alleged equitable defenses are only available in limited circumstances, which are not applicable here.

i. The 2007 Standstill Agreement does not apply to the claims in Occidental's Complaint.

multiple courts. *See e.g.*, *Hobart*, 758 F.3d at 775; *BASF*, 479 F. Supp. 2d at 221. As those courts explained, regardless of whether a federal court can borrow a state statute of limitations in other circumstances, it cannot do so "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes." *BASF*, 479 F. Supp. 2d at 221; *Hobart*, 758 F.3d at 775 (reasoning that using a state statute of limitations instead of § 113(g)(3) "would only stymie the policies underlying the federal cause of action").

[20] Further, Occidental's CSO ASAOC is, in fact, *explicitly* a § 122(h) cost-recovery settlement. Blum Cert., Ex. 4, CSO ASAOC, at ¶ 90. And both the CSO ASAOC and the Tierra Removal ASAOC specifically provide that Occidental received contribution protection pursuant to § 122(h)(4), the cost-recovery settlement provision. Blum Cert., Ex. 2, Tierra Removal ASAOC, at ¶ 82; Ex. 4, CSO ASAOC, at ¶ 104.

[21] Moreover, not all the SPG members were signatories to these agreements. *See* Appendix 1.

The 2007 Standstill Agreement expressly limits its application to specifically-identified orders and does not apply to orders or claims arising after the execution of the agreement. *See* Blum Supp. Cert., Ex. 2, 2007 Standstill Agreement, at ¶¶ 3.1, 3.2. It also specifically states that "[t]he parties to this Standstill Agreement retain all factual and legal defenses to any claims not expressly waived or limited by this Standstill Agreement." *Id.* at ¶ 3.6. Because the Tierra Removal ASAOC (executed in 2008), the CSO ASAOC (executed in 2011), and the RM 10.9 Removal UAO (issued in 2012) did not even exist when the 2007 Standstill Agreement was executed, the parties to the Agreement retained all statute of limitations defenses to these ASAOCs and UAO. The 2007 Standstill Agreement is thus inapplicable to and ***does not*** toll the statute of limitations for the claims raised in Occidental's Complaint.[22]

ii. The 2015 Tolling Agreement—entered into more than three years after Occidental executed the Tierra Removal ASAOC and the CSO ASAOC—does not revive time-barred claims.

The 2015 Standstill and Tolling Agreement references the Tierra Removal ASAOC and the CSO ASAOC, but Occidental's claims under those ASAOCs were already time-barred when the Agreement was executed,[23] and the Agreement provides that it does not revive time-barred

[22] The 2015 Standstill and Tolling Agreement corroborates that the 2007 Standstill Agreement does not apply to Occidental's claims here. In its description of the tolled claims and its definition of "Covered Matters," the 2015 Standstill and Tolling Agreement identified the claims covered by the 2007 Standstill Agreement separately from the Tierra Removal ASAOC, the CSO ASAOC, and the RM 10.9 Removal UAO. *See* Blum Supp. Cert., Ex. 3, 2015 Standstill and Tolling Agreement, pp. 1-2.

[23] Occidental concedes the 2015 Standstill and Tolling Agreement did not go into effect until May 6, 2015—after the Tierra Removal ASAOC and CSO ASAOC claims were already time-barred.

claims.[24] Occidental entered into the Tierra Removal ASAOC on June 23, 2008 and the CSO ASAOC on October 4, 2011. Compl. at ¶¶ 28-29. To be timely under the three-year statute of limitations, Occidental would have needed to bring its claims by June 23, 2011 and October 4, 2014, respectively. Occidental did not file its Complaint until June 30, 2018. Occidental's claims under the Tierra Removal ASAOC and the CSO ASAOC are therefore time-barred.[25]

b. Equitable tolling, the canon against absurdity, and the discovery rule do not overcome the statute of limitations barring the Tierra ASAOC, the CSO ASAOC, and the RM 10.9 Removal UAO.

Occidental's "equitable" defenses to the statute of limitation—equitable tolling, the canon against absurdity, and the discovery rule—are implausible and inapplicable. As explained above, the three-year statute of limitations runs from the execution of the settlement agreements or civil orders at issue. Occidental's potential claim for contribution thus "should have been apparent . . . from the moment the settlement was entered." *Atl. Richfield Co. v. United States*, 181 F. Supp. 3d 898, 922 (D.N.M. 2016).

Equitable tolling applies only if a party shows that (1) it has been pursuing its rights diligently and (2) some extraordinary circumstance stood in its way. *Pace v. DiGuglielmo*, 544

[24] Paragraph 10 specifically states: "This Agreement shall not revive any period of limitations or repose prescribed by an applicable statute of limitations or repose for the commencement of any cause of action if such period had already expired prior to the Effective Date of this agreement."

[25] Because the RM 10.9 Removal UAO was issued in 2012 and Occidental did not bring its Complaint until 2018, its claims under the RM 10.9 Removal UAO are time-barred for defendants that did not enter into the 2015 Standstill and Tolling Agreement. The SPG members that are not signatories to the 2015 Standstill and Tolling Agreement (or for that matter the 2007 Standstill Agreement) are listed in Appendix 1. As the SPG acknowledged in its motion to dismiss, the defendants that entered into the 2015 Standstill and Tolling Agreement are not arguing that the claims associated with the RM 10.9 were untimely as to them.

U.S. 408, 418 (2005). Neither circumstance applies here. Occidental had complete control over its claims, voluntarily chose not to protect its rights, and cannot now claim that it was "unfairly" put in its current position. Occidental could have incurred costs under the ASAOCs or UAO and directly sought indemnification from Tierra and Maxus—but chose not to do so. Occidental could have incurred costs itself and timely sought contribution from the defendants—but chose not to do so. Instead, Occidental relied on Tierra and Maxus to incur all the costs. It cannot now benefit from failing to exercise due diligence based on its reliance on its own indemnitor.[26]

The canon against absurdity—which is used to correct "monstrous" legislative mistakes—is similarly inapplicable. *See Robbins v. Chronister*, 435 F.3d 1238, 1241 (10th Cir. 2006) (citing *Sturges v. Crowninshield*, 17 U.S. 122, 202-03 (1819)). It is not absurd or inequitable to hold Occidental to the statutory limitations period—and it is certainly not "monstrous." Occidental knew by the face of its own agreements with EPA that it was subject to CERCLA. CERCLA's three-year statutory limitations period is very clear. To allow Occidental to recover would allow parties to avoid the statute of limitations simply by letting others incur the costs of clean-up, contrary to the purpose of CERCLA.

Occidental likewise misapplies the discovery rule. The discovery rule is a "narrow exception" that applies only to undiscovered injuries. *See Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 152 (3d Cir. 1998). In *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d. Cir. 1997), the court held that the plaintiff was aware of its CERCLA injury "when it agreed to

[26] Occidental also relies on *Young v. United States*, 535 U.S. 43 (2002) to support its position, a case superseded by statute. In fact, after *Young* was decided, Congress passed sweeping changes to the Bankruptcy Code, changes that were "intentionally meant . . . to overrule the holding in *Young*." *Clothier v. IRS (In re Clothier)*, 588 B.R. 28, 31 (Bankr. W.D. Tenn. 2018).

undertake costly remedial action." 111 F.3d at 1125; *see also* Blum Supp. Cert., Ex. 1, *Sandvik* Order at p. 12 (rejecting tolling the CERCLA statute of limitations under the discovery rule and holding that the statute of limitations began to run when the ASAOC became effective). Occidental knew of its liability from the time that it acquired the stock of Diamond in 1986. Occidental became aware of its "injuries" (*i.e.*, alleged damages) when it signed the ASAOCs and when it was issued a UAO. Occidental cannot now claim that it did not "discover" its injury until its indemnitors went into bankruptcy, so it cannot rely on pleading the discovery rule as a basis for avoiding the bar of the statute of limitations.

2. The contribution protection in the RM 10.9 Removal ASAOC precludes Occidental's claims under the RM 10.9 Removal UAO against certain defendants.[27]

For defendants that entered into the RM 10.9 ASAOC, Occidental's RM 10.9 UAO claims are precluded by contribution protection. All of Occidental's claims are barred by contribution protection because CERCLA's contribution bar applies to both § 113(f) contribution claims and § 107(a) cost-recovery claims. *See United States v. Colo. & E. R.R.*, 832 F. Supp. 304, 307 (D. Colo. 1993); *Dravo Corp. v. Zuber*, 804 F. Supp. 1182, 1185 (D. Neb. 1992).[28]

[27] The SPG members that executed the RM 10.9 Removal ASAOC are listed in Appendix 2.

[28] The cases cited by Occidental for the proposition that contribution protection only applies to § 113(f) claims involve unusual and limited settlement agreements. *See Ford Motor Co. v. Mich. Consol. Gas. Co.*, 993 F. Supp. 2d 693, 700 (E.D. Mich. 2014); *Roosevelt Irr. Dist. v. Salt River Project Agr. Imp. & Power Dist.*, 39 F. Supp. 3d 1051, 1057 (D. Ariz. 2014). Both cases involved unique AOCs that provided protection *only* from contribution claims. In contrast, the RM 10.9 Removal ASAOC provides protection against both "contribution actions" and for all other claims "as may be otherwise provided by law for 'matters addressed' in this Settlement Agreement."

3. *Occidental's Mutual Contribution Releases released many defendants from Occidental's claims under the 2016 ASAOC.*[29]

As an independent basis warranting dismissal, Occidental's claims under the 2016 ASAOC are barred against Defendants that entered into Mutual Contribution Release Agreements with Occidental as part of the Tierra/Maxus bankruptcy. Occidental does not dispute that its Mutual Contribution Release bars its claims to the extent those claims are for the first $165 million Occidental incurs under the 2016 ASAOC. However, Occidental does not allege in its Complaint (or argue in its briefing) that it has incurred more than $165 million under the 2016 ASAOC. The defendants that entered into Mutual Contribution Releases with Occidental are thus entitled to dismissal of Occidental's 2016 ASAOC claims.

CONCLUSION

For the reasons set forth above, and in the SPG's motion and brief in support, the SPG respectfully requests the Court dismiss Occidental's Complaint.

Dated: November 29, 2018

/s/ Joseph H. Blum

David R. Erickson (admitted *pro hac vice*)
Joseph H. Blum (NJ Bar No. 010211984)
SHOOK, HARDY & BACON LLP
2555 Grand Boulevard
Kansas City, MO 64108-2613
Telephone: 816.474.6550
Common Counsel for the Small Parties Group

Blum Cert. Ex. 7, at ¶ 74.a. Therefore, unlike *Ford* and *Roosevelt*, the RM 10.9 Removal ASAOC explicitly provides protection for both Occidental's § 107(a) and § 113(f) claims.

[29] The SPG members that received a Mutual Contribution Release from Occidental are listed in Appendix 3.

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to this Court's Pre-Answer Scheduling Order (ECF No. 12), on November 29, 2018, a true copy of the within "The Small Parties Group Defendants' Reply Brief in Support of Motion to Dismiss" was served upon the below counsel. Pursuant to the Court's Pre-Answering Scheduling Order, this will be filed on ECF on November 30, 2018.

John J. McDermott, Esq.
William J. Stack, Esq.
Charles J. Dennen, Esq.
ARCHER & GREINER, P.C.
One Centennial Square
Haddonfield, NJ 08033

Kathy D. Patrick, Esq.
Anthony N. Kaim, Esq.
Jorge M. Gutierrez, Esq.
GIBBS & BRUNS, LLP
1100 Louisiana, Suite 5300
Houston, TX 77002

Larry D. Silver, Esq.
David E. Romaine, Esq.
Jennifer Graham Meyer, Esq.
Erin M. Carter, Esq.
LANGSAM STEVENS SILVER & HOLLAENDER, LLP
1818 Market Street, Suite 2610
Philadelphia, PA 19103

Attorneys for Plaintiff Occidental Chemical Corporation

Dated: November 29, 2018

/s/ Joseph H. Blum
Joseph H. Blum

APPENDIX 1

The following SPG members did not enter into the 2015 Standstill and Tolling Agreement (nor the 2007 Standstill Agreement) and therefore Occidental's § 113(f) claims under the RM 10.9 UAO are time-barred against those defendants:

1. Akzo Nobel Coatings, Inc.
2. Bath Iron Works Corporation
3. Canning Gumm LLC
4. EnPro Industries, Inc.
5. Johnson & Johnson
6. MI Holdings, Inc.
7. Nappwood Land Corporation
8. Novartis Corporation
9. The Okonite Company, Inc.
10. Pabst Brewing Company, LLC
11. RTC Properties, Inc.
12. Royce Associates, a Limited Partnership
13. Sunoco (R&M), LLC
14. Sunoco Partners Marketing & Terminals L.P.
15. United States Steel Corporation

APPENDIX 2

The following SPG members entered into the RM 10.9 Removal ASAOC and therefore have contribution protection from Occidental's claims under the RM 10.9 Removal UAO:

1. 21st Century Fox America, Inc.
2. A.E. Staley Manufacturing Company
3. Arkema Inc.
4. Ashland LLC
5. Atlantic Richfield Company
6. BASF Corporation
7. BASF Catalysts LLC
8. Benjamin Moore & Co.
9. Berol Corporation
10. CBS Corporation
11. CNA Holdings LLC
12. Coats & Clark Inc.
13. Conopco, Inc.
14. Cooper Industries, LLC
15. Covanta Essex Company
16. Croda Inc.
17. DII Industries, LLC
18. Emerald Kalama Chemical, LLC
19. Essex Chemical Corporation
20. Franklin-Burlington Plastics, Inc.
21. Garfield Molding Company, Inc.
22. General Electric Company
23. Givaudan Fragrances Corporation
24. Goodrich Corporation
25. Harris Corporation
26. Hexcel Corporation
27. Hoffmann-La Roche, Inc.
28. Honeywell International Inc.
29. ISP Chemicals LLC
30. Kalama Specialty Chemicals, Inc.
31. Leemilt's Petroleum, Inc.
32. Legacy Vulcan, LLC
33. Mallinckrodt LLC
34. McKesson Corporation
35. National-Standard LLC
36. Newell Brands Inc.
37. Nokia of America Corporation
38. Novelis Corporation
39. Noveon Hilton Davis, Inc.

40. Otis Elevator Company
41. Pharmacia LLC
42. PPG Industries, Inc.
43. Public Service Electric and Gas Company
44. Purdue Pharma Technologies, Inc.
45. Quala Systems, Inc.
46. Quality Carriers, Inc.
47. Revere Smelting & Refining Corporation
48. Safety-Kleen Envirosystems Company
49. Sequa Corporation
50. Staley Holdings LLC
51. Stanley Black & Decker Inc.
52. STWB Inc.
53. Sun Chemical Corporation
54. Tate & Lyle Ingredients Americas LLC
55. Textron, Inc.
56. The Hartz Mountain Corporation
57. The Newark Group, Inc.
58. The Sherwin-Williams Company
59. Tiffany and Company

APPENDIX 3

The following SPG members received Mutual Bankruptcy Releases from Occidental in the Tierra/Maxus bankruptcy:

1. A.E. Staley Manufacturing Company
2. Arkema Inc.
3. Atlantic Richfield Company
4. BASF Corporation
5. Berol Corporation
6. CBS Corporation
7. CNA Holdings LLC
8. Coats & Clark Inc.
9. Cooper Industries, LLC
10. Covanta Essex Company
11. Croda Inc.
12. DII Industries, LLC
13. Enpro Holdings, Inc.
14. Essex Chemical Corporation
15. Franklin-Burlington Plastics, Inc.
16. Garfield Molding Company, Inc.
17. General Electric Company
18. Hexcel Corporation
19. Hoffman-LaRoche, Inc.
20. Honeywell International Inc.
21. Leemilt's Petroleum, Inc.
22. McKesson Corporation
23. Newell Brands Inc.
24. Novelis Corporation
25. Otis Elevator Company
26. Pharmacia LLC
27. Pitt-Consol Chemical Company
28. Purdue Pharma Technologies, Inc.
29. Quala Systems, Inc.
30. Quality Carriers, Inc.
31. Revere Smelting & Refining Corporation
32. Safety-Kleen Envirosystems Company
33. Staley Holdings LLC
34. Stanley Black & Decker Inc.
35. Sunoco (R&M), LLC
36. Sunoco Partners Marketing & Terminals L.P.
37. Tate & Lyle Ingredients Americas LLC
38. Textron, Inc.
39. The Hartz Mountain Corporation

40. The Newark Group, Inc.
41. Tiffany and Company